Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM MULLIN,

Petitioner,

v.

RAYTHEON COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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7899

QUESTIONS PRESENTED.

I. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, prohibits disparate impact discrimination.

II. Whether the court of appeals failed to apply controlling state law in holding that the Massachusetts antidiscrimination statute does not impose liability on a theory of disparate impact in an age discrimination case.

PARTIES TO THE PROCEEDINGS.

The parties named in the caption, William Mullin and Raytheon Company, were the only parties to the proceedings before the court of appeals and the district court.

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No. 98-

In The

Supreme Court of the United States

October Term, 1998

WILLIAM MULLIN,

Petitioner,

v.

RAYTHEON COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner William Mullin respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit.

OPINION BELOW.

The opinion of the United States Court of Appeals for the First Circuit affirming the judgment of the United States District Court for the District of Massachusetts, which granted the respondent's motion for summary judgment is

reported at 164 F.3d 696 (1st Cir. 1999), and is reprinted at App. 1a. The opinion of the United States District Court allowing respondent's motion for summary judgment is reported at 2 F.Supp.2d 165 (D. Mass. 1998), and is reprinted at App. 23a.

JURISDICTION.

The judgment of the United States Court of Appeals for the First Circuit was entered on January 13, 1999. The petitioner timely filed a Petition for Rehearing (with Suggestion for Rehearing *En Banc*) on January 27, 1999. The Petition for Rehearing was denied on February 10, 1999. (App. 45a). The petition for writ of certiorari is therefore due on May 11, 1999. This Court has jurisdiction to issue the requested writ under 28 U.S.C. § 1254(1).

STATUTES INVOLVED.

This case involves the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (hereinafter, the "ADEA"), the relevant text of which is set forth at App. 53a-54a, Title VII of the Civil Rights Act of 1064, 42 U.S.C. § 2000e *et seq.*, the relevant text of which is set forth at App. 54a-55a, the Rules of Decision Act, 28 U.S.C. § 1652, the text of which is set forth at App. 53a, and Massachusetts General Laws c. 151B, § 4(1B), the text of which is set forth at App. 53a.

STATEMENT OF THE CASE.

Factual Background.

The petitioner was born on August 17, 1934 and began working for the respondent in 1967. (App. 24a). Raytheon classifies its salaried employees according to a series of grades numbered 4 to 18, each of which carries a particular salary range. (App. 24a). An employee may change levels without changing salary, or vice-versa, under certain circumstances, but generally may not receive a salary that is outside the range for his level. (App. 24a). By 1995, Mullin was earning approximately $130,000 annually and had been classified at grade 15 since 1979. (App. 24a). Raytheon consistently rated Mullin "outstanding" or "excellent" in performance reviews. (App. 24a).

Mullin's job descriptions, as distinct from his salary or grade, varied considerably during his tenure. (App. 24a). From November 1979 to November 1986, Mullin supervised over 2,000 employees as the Manufacturing Operations Manager for Raytheon's Andover, Massachusetts plant. (App. 24a). Between November 1986 and some time in 1991, however, he became the Manufacturing Operations Manager for the second shift at the Lowell, Massachusetts plant, where he supervised approximately 400 employees. (App. 24a). After 1991, Mullin held a series of positions in various capacities at Raytheon, supervising smaller departments with fewer or no employees reporting to him. (App. 24a). His latest assignment was in 1994, a transfer to the gyro and motorwind work centers in the Lowell plant, where he supervised between 55 and 85 employees. (App. 24a). Mullin acted during these years as a "troubleshooter" who moved from position to position to intervene in areas that needed improvement or were experiencing problems. (App. 24a).

In 1994 and 1995, Raytheon closed its plants in Lowell and Manchester, New Hampshire, and moved those operations to its Andover facility. (App. 25a). In conjunction with the plant closings, Raytheon underwent a major restructuring, resulting in a salary freeze and the consolidation of three defense divisions into one. (App. 25a). The company eliminated redundant positions and either laid off or reassigned a number of employees. (App. 25a). Mullin was neither reassigned nor laid off. (App. 25a).

Raytheon set out in the wake of restructuring to determine whether the salaries and grades of the remaining employees reflected their actual job descriptions and responsibilities (hereinafter, this process is referred as "the Review and Reclassification"). (App. 25a). In Mullin's case, the company determined that Mullin should be reclassified to a grade 12 position and that his salary should be reduced to the maximum for a grade 12 position. (App. 25a). In October 1995, or thereabout, Raytheon reclassified Mullin from grade 15 to grade 12, and reduced his salary significantly. (App. 25a).

Mullin contends that the decision to downgrade him and reduce his salary constitutes age discrimination. He identified several incidents proximate to the Review and Reclassification that bear on his discrimination claim. (App. 26a-27a). Most important for purposes of this petition, Mullin offered the expert opinion of David W. Griffin, Ph.D., a labor statistician who drew a statistical inference that older employees were more likely to be downgraded and less likely to be upgraded than younger employees in connection with the Review and Reclassification. (App. 27a).

Proceedings Below.

On December 9, 1996, the petitioner filed a complaint in the United States District Court for the District of Massachusetts against respondent Raytheon Company, his employer.

The petitioner asserted four causes of action against the respondent, each related to age-discrimination: Disparate Treatment under the ADEA; Disparate Impact under the ADEA; Disparate Treatment under Mass. Gen. Laws c. 151B; and Disparate Impact under Mass. Gen. Laws c. 151B.

Jurisdiction in the district court was based upon 28 U.S.C. § 1331 because the action arose under the laws of the United States (the ADEA) and pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties (a New Hampshire resident and a Delaware corporation with a principal place of business in Massachusetts) and the amount in controversy exceeded $75,000.00, exclusive of interest and costs.

On January 2, 1997, the respondent filed its Answer to the Complaint. On January 9, 1998, following discovery, the respondent filed a motion for summary judgment, seeking summary judgment in its favor on all counts of the complaint. On January 23, 1998, the petitioner filed his opposition, together with supporting materials. The court took the matter under advisement following a hearing on February 12, 1998.

On April 20, 1998, the court issued a memorandum and order granting the respondent's motion for summary judgment as to all four counts of the complaint. On April 21, 1998, in accordance with the memorandum and order, final judgment entered in favor of the respondent. On May 15, 1998, the petitioner timely filed a notice of appeal.

On November 5, 1998, following the submission of briefs, the United States Court of Appeals for the First Circuit held a hearing on the petitioner's appeal. On January 13, 1999, the court of appeals issued an opinion and judgment affirming the judgment of the district court.

In its decision, the court of appeals expressly held that the ADEA does not impose liability under a theory of disparate impact. The court of appeals further held that a claim of age

discrimination asserted under Massachusetts state law could not be grounded solely on a theory of disparate impact.

On January 27, 1999, the petitioner timely filed a Petition for Rehearing (with Suggestion for Rehearing *En Banc*). The Petition for Rehearing and the Suggestion for Rehearing *En Banc* were denied on February 10, 1999.

REASONS FOR GRANTING THE WRIT.

Introduction.

The court of appeals held that the ADEA does not impose liability under a theory of disparate impact. This holding conflicts with the decisions of other courts of appeals on this important issue; it is inconsistent with this Court's interpretation of Title VII, upon which the ADEA was modeled; and it significantly narrows the scope of protection afforded by the ADEA. The court of appeals further held that the Massachusetts employment discrimination statute does not recognize a theory of disparate impact. In so holding, the circuit court violated the *Erie* doctrine by failing to follow established state law. Review by this Court is therefore warranted.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON AN IMPORTANT FEDERAL QUESTION.

Disparate impact is a Title VII doctrine endorsed by this Court in the seminal case of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). As noted by the First Circuit in its decision, Title VII and the ADEA contain substantially similar language. (App. 7a-8a). Accordingly, a number of circuits assumed that disparate impact was also a viable theory under the ADEA. (App. 9a) (citing cases).

This assumption was called into question when this Court issued its decision in *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993). Although *Hazen Paper* was a disparate treatment case, language in the majority and concurring opinions caused lower courts to rethink the viability of disparate impact doctrine in the ADEA context. Because of the comments in *Hazen Paper*, 507 U.S. at 610-11, 618, a number of lower courts have revisited the issue of disparate impact analysis in the ADEA context and have reached differing conclusions. The result has been a split in the circuits.

In addition to the First Circuit opinion which is the subject of this opinion, four circuits have held or suggested that disparate impact is not a viable theory under the ADEA. *Ellis* v. *United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 517 U.S. 1 245 (1996); *Lyon* v. *Ohio Educ. Assn & Prof'l Staff Union*, 53 F.3d 135, 138-39 (6th Cir. 1995); *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3rd Cir.), *cert. denied*, 516 U.S. 916 (1995); *EEOC* v. *Francis W. Parker School*, 41 F.3d 1073, 1077-78 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995). In contrast, three circuits continue to recognize disparate impact as a viable theory under the ADEA. *District Council 37, AFSCME, AFL-CIO* v. *New York City Dept. of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Smith* v. *City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1996); *Mangold* v. *California Pub. Util. Commn*, 67 F.3d 1470, 1474 (9th Cir. 1995).

Thus, as a result of the comments in *Hazen Paper*, there is a split in the circuits as to the viability of disparate impact theory in the context of the ADEA. The First, Third, Sixth, Seventh, and Tenth Courts of Appeal have held or suggested that such claims are not cognizable, whereas the Second, Eighth, and Ninth Courts of Appeal have either held or suggested that such claims are cognizable under the ADEA.

The conflict in the circuits on this issue is unlikely to abate. The First Circuit denied Mullin's Suggestion for Rehearing *En Banc* in this case. (App. 50a). This Court should

grant certiorari to resolve the conflict in the circuits initiated by this Court's comments in *Hazen Paper* and furthered by the First Circuit's decision in this case.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The First Circuit explicitly determined that the ADEA does not prohibit disparate impact discrimination. (App. 15a-16a). Even if there were not a split in the circuits on this issue, it represents an important question of federal law that has not been, but should be, settled by this Court. This is all the more true given that this issue was largely considered resolved until this Court issued its decision in *Hazen Paper*.

The decision of the court of appeals based its decision on several factors: (a) the statutory language; (b) the availability of the "reasonable factors other than age defense" in 29 U.S.C. § 623(f)(1); (c) legislative history; and (d) certain 1991 congressional amendments to Title VII and the ADEA. None of these reasons are persuasive.

A. *Statutory Language.*

The circuit court focused on the statutory language of 29 U.S.C. § 623(a)(1) and found that section an apparent linguistic inhospitability to disparate impact claims. (App. 7a-12a). But in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court effectively interpreted the substantially similar language of Title VII to support disparate impact under Title VII.

Moreover, in reaching this conclusion, the circuit court failed to consider the language of § 623(a)(2) which provides that "[i]t shall be unlawful for an employer . . . to limit, seg-

regate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . ." 29 U.S.C. § 623(a)(2). Although the First Circuit did reach this issue in connection with its denial of the Petition for Rehearing, it misconstrued the significance of this statutory language.

This portion of the ADEA is virtually identical to the language of 42 U.S.C. § 2000e-2(a)(2), the section of Title VII which provides a textual basis for prohibiting practices that are facially neutral but discriminatory in operation. *Connecticut* v. *Teal,* 457 U.S. 440, 446 (1982); *Lorance* v. *AT&T Technologies, Inc.,* 490 U.S. 900, 904 (1989). Given that the language of 42 U.S.C. § 2000e-2(a)(2) supports the application of disparate impact liability to employers under Title VII, the nearly identical language of § 623(a)(2) must be read as supporting the application of disparate impact liability under the ADEA. While the statutory language may not explicitly provide for disparate impact liability, the same could be said of Title VII before its amendment in 1991. Nonetheless, this Court identified the identical language as supporting disparate impact in Title VII. *General Elec. Co.* v. *Gilbert,* 429 U.S. 125, 137 n.13 (1976). *Compare* 42 U.S.C. § 2000e-2(a) (Title VII) with 29 U.S.C. § 623(a)(2) (ADEA).

Thus, the circuit court opinion misapprehended the controlling statutory language and incorrectly concluded that the language of the ADEA was inhospitable to claims of disparate impact. In fact, the statutory language of the ADEA actually supports the recognition of the disparate impact theory.

B. *"Reasonable Factors Other Than Age" Defense.*

The circuit court also determined that 29 U.S.C. § 623(f)(1), which exempts from the general prohibitions of the ADEA distinctions based on reasonable factors other than age (hereinafter, the "RFOA Defense"), counsels against the recognition of disparate impact claims under the ADEA. (App. 11a-13a). The circuit court likened the RFOA Defense to a provision of the Equal Pay Act which allows different wages for men and women as long as the difference was "based on any other factor other than sex." 29 U.S.C. § 206 (d)(1)(iv). In *County of Washington* v. *Gunther,* 452 U.S. 161 (1981), this Court held that this provision of the Equal Pay Act limited the application of that Act to cases of intentional discrimination. Thus, the circuit court concluded that because the language of the ADEA exemption is similar the Equal Pay Act, disparate impact claims (which do not focus on intentional discrimination) are not available under the ADEA. (App. 12a-13a).

In so holding, the circuit court neglected to consider an important difference between the language of the two exemption provisions. The Equal Pay Act exemption applies to differences based on "*any* other factor other than sex", whereas the ADEA exempts differentiation based on "*reasonable* factors other than age" (emphasis added). The circuit court's oversight is highlighted by the omission of the word "reasonable" in its recitation of the RFOA Defense. (App. 11a-12a).

This is a matter of no small import because, as noted by circuit court itself, "[a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." (App. 12a). Indeed, for the "reasonable" language of the ADEA exemption to have any meaning, there must be factors other than age which are unreasonable and fail to qualify

for the exemption. In such a case an employee could not make out a case for disparate treatment, since the unreasonable factor is a factor other than age, and *Hazen Paper* holds that disparate treatment exists only where the employer relies on age, not on some other factor that might simply correlate with age. Thus, if an employee cannot bring a disparate impact claim based on unreasonable factors other than age, then the "reasonable" language of § 623(f)(1) is meaningless.

The circuit court expressed concern that if the RFOA Defense is not read to exclude disparate impact claims, then that provision adds nothing to the statute in violation of well-established rules of statutory construction. (App. 13a). This is not the case, however, if the term "reasonable" is read as codifying the business necessity defense which was recognized in disparate impact claims before *Hazen Paper*. *See e.g., Francis W. Parker School,* 41 F.3d at 1080 (Cudahy, J., dissenting).

Such a reading of the statute allows a plaintiff to pursue a disparate impact claim under the ADEA if he can show that a facially neutral practice of the employer resulted in a disproportionate impact, while preserving the employer's right to demonstrate that the disparate impact was reasonably necessary to carry out the employer's business. As noted by one commentator, the Equal Employment Opportunity Commission and the Department of Labor have long interpreted § 623(f)(1) as an affirmative defense to disparate impact claims under the ADEA. *See* Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act,* 42 Fla.L.Rev. 229, 302-03 (1990).

Contrary to the circuit court opinion, the existence of the RFOA Defense does not support a finding that disparate impact analysis is not cognizable under the ADEA.

C. *Legislative History.*

The circuit court also erroneously relied on the legislative history of the ADEA and certain amendments to Title VII in 1991 as support for the position that disparate impact should not be recognized under the ADEA. For example, the circuit court relied on the report ("the Report") issued by the Secretary of Labor which served as the impetus for the ADEA. (App. 14a). While the circuit court correctly noted that the Report focused largely on overt discrimination, the court gave far too much weight to the Report.

As Professor Kaminshine notes:

> . . . commentators in opposition infer too much from the Secretary's preoccupation with overt age restrictions . . . Theories about discrimination and disparate impact would not become established until the Supreme Court's decision in *Griggs*. . . . But even assuming that the report reflects some early understanding of disparate impact liability, its focus on arbitrary age discrimination does not reveal a clear intent to insulate neutral practices from disparate impact scrutiny.

Kaminshine, *supra,* at 290-91.

The First Circuit simply made too much of the Report.

D. *1991 Amendments.*

The circuit court further relied upon the fact that Congress amended Title VII to explicitly recognize disparate impact in 1991, but it did not also amend the ADEA. (App. 15a-16a). However, there is no evidence the issue was even on Con-

gress' agenda. The 1991 amendments to Title VII were in response to several court opinions which arguably hurt Title VII plaintiffs. There was no comparable judicial assault on the ADEA and no court had ever found disparate impact analysis unavailable under the ADEA.

Under the circumstances, it is simply unpersuasive to read so much into congressional inaction. The circuit court should not have read any significance in Congress' inaction on this issue, especially where the statutory language already supports recognition of the disparate impact theory. *Zuber* v. *Allen*, 396 U.S. 168, 185-86 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis").

III. THE DECISION OF THE COURT OF APPEALS VIOLATES THE *ERIE* DOCTRINE WITH RESPECT TO THE MASSACHUSETTS DISCRIMINATION STATUTE.

The circuit court also held that disparate impact should not be recognized as a basis for a claim of age discrimination under Mass. Gen. Laws c. 151B. (App. 21a). In so holding, the court dismissed as *dictum* controlling language by the Massachusetts Supreme Judicial Court which explicitly recognizes the viability of disparate impact under Mass. Gen. Laws c. 151B. (App. 18a-19a). *Lynn Teachers Union* v. *Massachusetts Comm'n Against Discrimination*, 406 Mass. 515, 526, 549 N.E.2d 97, 103 (1990) ("[a] *prima facie* case of employment discrimination can be based on theory of disparate impact or disparate treatment."). *See also School Comm. of Braintree* v. *Massachusetts Comm'n Against Discrimination*, 377 Mass. 424, 428, 386 N.E.2d 1251 (1979).

While neither of these cases involved a claim of age discrimination, discrimination prohibited by Massachusetts state law is governed by a single statute (Mass. Gen. Laws c. 151B). The exact nature of the discrimination at issue in

any given case is simply irrelevant. *See Johansen* v. *NCR Comten, Inc.*, 30 Mass. App. Ct. 294, 568 N.E.2d 611, *rev. denied*, 410 Mass. 1102, 573 N.E.2d 984 (1991):

> [t]he parties do not dispute, nor should they, the applicability of guidelines developed in race and gender discrimination cases to age discrimination cases. There is no reason for the procedural framework to vary with the nature of the unlawful discriminatory conduct.

30 Mass. App. Ct. at 297 n.4, 568 N.E.2d at 613 n.4.

There is little doubt that the Massachusetts Supreme Judicial Court, the highest and best authority on Mass. Gen. Laws c. 151B, has spoken: disparate impact is a valid theory under Chapter 151B. The circuit court's analysis of *Cox* v. *New England Tel. & Tel. Co.*, 414 Mass. 375, 607 N.E.2d 1035 (1993) was unnecessary and incorrect. An analysis of *Cox* demonstrates no indication that the Massachusetts Supreme Judicial Court differentiated between handicap discrimination and other forms of discrimination in terms of the assertion of disparate treatment and disparate impact claims. 414 Mass. at 384-85, 607 N.E.2d at 1041. Significantly, *Cox* recognized the validity of the disparate impact theory under Mass. Gen. Laws c. 151B, 414 Mass. at 385, 607 N.E.2d at 1041. The circuit court misconstrued the *Cox* decision.

There has never been any indication that the Massachusetts Supreme Judicial Court intends to modify its prior holdings on the viability of disparate impact claims under Mass. Gen. Laws c. 151B. In the absence of any such indications, the circuit court was not free to impose its own view. *See e.g., Carlton* v. *Worcester Ins. Co.*, 923 F.2d 1 n.1 (1st Cir. 1991) ("[w]hile it is not necessary that a state case be explicitly overruled by the state court in order to lose its persuasive force . . . there must be at least footprints pointing

conspicuously in that direction"). In doing so, the circuit court violated the *Erie* doctrine, which required the circuit court to apply the substantive law of Massachusetts with respect to the state law claims asserted by Mullin. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). *See also* 28 U.S.C. § 1652.

The essence of the *Erie* doctrine, according to Justice Frankfurter, was that in diversity cases "the outcome of the litigation should be the same, so far as legal rules determine . . . , as it would be if tried in a State court." *Guaranty Trust* v. *York*, 326 U.S. 99, 109 (1945). In holding that disparate impact claims are not cognizable under Mass. Gen. Laws c. 151B notwithstanding decisions of the Massachusetts Supreme Judicial Court to the contrary, the court of appeals violated this doctrine.

CONCLUSION.

For the foregoing reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals
For the First Circuit

No. 98-1656

WILLIAM MULLIN,

Plaintiff, Appellant,

v.

RAYTHEON COMPANY,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young, U.S. District Judge]

Before
Selya, Circuit Judge,
Coffin and Campbell, Senior Circuit Judges.

J. Allen Holland, with whom John R. Cavanaugh and Lynch, Brewer, Hoffman & Sands, LLP were on brief, for appellant.

James F. Kavanaugh, Jr., with whom Deborah W. Kirchwey and Conn, Kavanaugh, Rosenthal, Peisch & Ford, L.L.P. were on brief, for appellee.

January 13, 1999

SELYA, Circuit Judge. Plaintiff-appellant William Mullin sued his employer, defendant-appellee Raytheon Company, contending that his demotion (and a concomitant reduction in remuneration) constituted age discrimination in contravention of both the federal Age Discrimination in Employment Act (ADEA) , 29 U.S.C. §§ 621-634, and the Massachusetts Anti-Discrimination Act, Mass. Gen. Laws ch. 151B, § 4(1B), (Chapter 151B) . The district court granted Raytheon's motion for summary judgment on all counts. See Mullin v. Raytheon Co., 2 F. Supp.2d 165 (D. Mass. 1998). Mullin's appeal raises, inter alia, a question of first impression in this circuit as to the viability of "disparate impact" claims in age discrimination cases. we conclude that such claims are not cognizable under either federal or state law.

I. BACKGROUND

Consistent with the summary judgment standard, we recount the material facts in the manner most congenial to the appellant's theory of the case, accepting his (properly documented) version of genuinely disputed facts and drawing all reasonable inferences in his favor. See Coyne v. Taber Partners I, 53 F.3d 454, 457 (lst Cir. 1995); Garside v. Osco Drug, Inc., 895 F. 2d 46, 48 (lst Cir. 1990).

Raytheon assigns salaried employees a labor grade on a numeric scale that ranges from 4 to 18. Each grade corresponds to a different (successively higher) earnings bracket. Prior to filing this action, the appellant worked for Raytheon for some twenty-nine years. He steadily climbed the corporate lattice. In 1979, he achieved a grade of 15 and became manager of manufacturing operations for Raytheon's Ando-

ver (Massachusetts) plant — a position in which he supervised more than 2,000 employees. At that point, his upward progression ceased. Although he retained a grade 15 classification until 1995, his duties changed and his authority gradually contracted. In 1984, Raytheon transferred Mullin to its Lowell (Massachusetts) plant, where he became a second-shift manager, supervising some 400 employees. Beginning in 1989, the company informally assigned him to the role of trouble-shooter and transferred him from area to area, according to need. In 1994, Raytheon designated him as the manager of the Gyro and Motorwind Work Centers at the Lowell plant — a position in which he oversaw fewer than 100 subordinates.

Over the years, Raytheon's principal business has been the manufacture of military ordnance. When the Cold War ended and Congress slashed the Defense Department's procurement budget, the volume of work potentially available to Raytheon decreased proportionately. In an effort to adjust to these economic realities, Raytheon inaugurated major structural changes. Among other steps, it closed the Lowell plant and one in Manchester, New Hampshire, and folded the operations previously performed at those locations into its Andover plant. In the process, Raytheon relocated the appellant and his department to Andover.

In addition to plant closings and consolidations, the retrenchment produced a significant number of layoffs and reassignments. It also included a wage freeze, during which Raytheon assayed the commensurability of upper-level salaried employees' assigned labor grades and actual responsibilities. The company evaluated each position in light of criteria such as the complexity of the work undertaken, the number of employees supervised, and the financial responsibility inherent in the job. In the appellant's case, it deemed his grade (15) inconsistent with his duties and downgraded him to level 12 — an action that, under established corporate policy, required a downward compensation adjustment to

bring him within the salary range that corresponded to his new classification.[1]

Claiming that age discrimination prompted this demotion, the appellant sued. His complaint, grounded in both federal question jurisdiction, 28 U.S.C. § 1331, and diversity jurisdiction, 28 U.S.C. § 1332 — Mullin is a citizen of New Hampshire and Raytheon is a Delaware corporation with its principal place of business in Massachusetts — set out four statements of claim: two for disparate treatment (one under the ADEA and one under Chapter 151B) and two for disparate impact (one under the ADEA an one under Chapter 151B). After a period of discovery, Raytheon moved for brevis disposition and the district court obliged. See Mullin, 2 F. Supp.2d at 175. This appeal ensued.

II. ANALYSIS

Summary judgment is a device that "has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways." Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991). Its essential role is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992). The mechanics of the device are familiar, see, e.g., Garside, 895 F.2d a 48, and do not warrant exegetic description here. For present purposes, it suffices to

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[1] Raytheon phased in the pay cut, reducing the appellants salary by 10% in October 1995, and scheduling another 10% reduction to take place six months thereafter. The second cut never materialized because Mullin took a medical leave.

note that summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether these criteria have been satisfied, we, like the trial court, "must view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990).

With this brief preface, we turn to the appellant's asseverational array. In the process, we review the lower court's decision de novo. See Garside, 895 F.2d at 48.

A. Disparate Treatment — ADEA and Chapter 151B Claims.

The tripartite burden-shifting regime conceived by the Supreme Court for use in Title VII cases, see St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-11 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), applies to disparate treatment claims under the ADEA and Chapter 151B. See, e.g. , Mesnick, 950 F.2d at 823 (ADEA); Whalen v. NYNEX Info. Resources Co., 419 Mass. 792, 795, 647 N.E.2d 716, 718 (1995) (Chapter 151B). The parties concede that the appellant proffered a prima facie case and that Raytheon, by citing the cuts in defense spending, the attendant need to downsize, and the outcome of the personnel reevaluation, articulated a legitimate, non-discriminatory explanation both for restructuring and for demoting the appellant. Thus, the contest here revolves around the third step of the McDonnell Douglas pavane.

For purposes of Mullin's ADEA-based disparate treatment claim, we must therefore concentrate on whether he adduced enough evidence to create a trialworthy question

both as to the employer's alleged motivation (animus based on age) and as to the pretextuality of its explanation for the adverse employment action. See Mesnick, 950 F.2d at 823; Medina-Munoz v. R. J. Reynolds Tobacco Co., 896 F.2d 5, 8-9 (1st Cir. 1990).

The appellant's burden under Chapter 151B is somewhat less onerous. While federal law requires a showing of pretext plus age animus, the Massachusetts courts appear, at the third step of the pavane, to require a claimant to show only pretext. See Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-46, 646 N.E.2d 111, 116-17 (1995).[2] The difference between the federal "pretext-plus" standard and the Massachusetts "pretext only" standard, though sometimes significant, is irrelevant in this case. The district court determined that the appellant failed to raise a genuine issue as to either pretext or age animus, see Mullin, 2 F. Supp.2d at 172, and, since we agree with the former determination, the appellant's disparate treatment claims fail under either standard.

We need not tarry. Raytheon advanced a strong, objectively verifiable set of reasons for consolidating operations, restructuring its work force, and downgrading Mullin: significant revenue loss stemming from massive Defense Department cutbacks, culminating in a reevaluation of all upper-echelon salaried employees. The appellant points to nothing that casts doubt upon the legitimacy of this reason, nor does he proffer any substantial evidence that would permit a rational jury to find that Raytheon rigged the restructuring in a fashion designed to ensure that the appellant's labor grade and/or compensation level would be reduced

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[2] This conclusion assumes, favorably to the appellant, that Blare — a gender discrimination case — remains good law and that it is fully transferable to the age discrimination context. We decide neither point today.

unfairly. The district court painstakingly analyzed all the appellant's submissions in this regard, see id. at 169-71, and it would be pleonastic to rehearse that discussion here. We content ourselves with saying that, after having carefully sifted the record, we uphold the lower court's disposition of the disparate treatment claims for essentially the reasons elucidated in its rescript. See Lawton v. State Mut. Life Assur. Co. of Am., 101 F.3d 218, 220 (1st Cir. 1996) (counseling appellate courts not to wax longiloquent when a trial court has resolved a claim correctly and explained its rationale in a well-reasoned rescript) ; In re San Juan Dupont Plaza Hotel Fire Litig., 989 F.2d 36, 38 (1st Cir. 1993) (similar).

B. Disparate Impact — ADEA.

The linchpin of a disparate treatment claim is proof of the employer's discriminatory motive. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Not so a claim of disparate impact: that type of claim is predicated not on proof of intentional discrimination, but, rather, on proof that the employer utilizes "employment practices that are facially neutral in their treatment of different groups but . . . in fact fall more harshly on one group than another and cannot be justified by business necessity." Id. Although the district court skirted the question whether a disparate impact cause of action lies under the ADEA, see Mullin, 2 F. Supp.2d at 174-75, we take a more direct route. See Mesnick, 950 F.2d at 822 ("An appellate panel is not restricted to the district court's reasoning but can affirm a summary judgment on any independently sufficient ground.").

We begin by focusing on the statutory language. See Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) In pertinent part, the ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect

to his compensation, terms, conditions, or privileges of employment, because of such individuals age." 29 U.S.C. § 623(a)(1). A commonsense reading of this statement strongly suggests that the statute includes a requirement of intentional discrimination. See Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996) ("It would be a stretch to read the phrase 'because of such individual's age' to prohibit incidental and unintentional discrimination that resulted because of employment decisions which were made for reasons other than age.") (emphasis in original). However, Title VII contains parallel language,[3] and the Supreme Court concluded almost three decades ago that such language encompassed a theory of liability based on disparate impact. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). The question, then, is whether the

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[3] Title VII makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)-(2).

ADEA, despite the apparent linguistic inhospitability, also should be read to encompass disparate impact claims.

Congress enacted the ADEA in 1967. Prior to 1993, several courts ruled that the ADEA permitted the maintenance of disparate impact claims. See, e.g., Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992) ; Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992); EEOC v. Borden's, Inc., 724 F.2d 1390, 1394-95 (9th Cir. 1984); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 690 (8th Cir. 1983). All of these courts simply assumed that Griggs had settled the issue. The tectonic plates shifted when the Court decided an ADEA case, Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). Although Hazen Paper involved disparate treatment rather than disparate impact, see id. at 610, language in the majority and concurring opinions caused lower courts to rethink the viability of disparate impact doctrine in the ADEA context.

Writing for a unanimous Court in Hazen Paper, Justice O'Connor declared that "disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." Id. at 610. Congress passed the ADEA due to "its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." Id. Consequently, the rationale that undergirds the statute is inapposite in instances where the employment decision is "wholly motivated by factors other than age, . . . even if the motivating factor is correlated with age." Id. at 611.

This analysis is telling. Since disparate impact claims encompass the precise scenario that Justice O'Connor describes — disparate impact assigns liability when employment practices are grounded in factors other than the statutorily protected characteristic (say, age), yet fall more harshly on individuals; within the protected group (say, older persons) — the inescapable implication of her statements is that the imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it en-

acted the ADEA. Equally as important, Justice O'Connor's exposition of the purposes underpinning the ADEA sets that statute apart from Title VII (and, thus, effectively distinguishes Griggs). Congress enacted Title VII in an effort to equalize employment opportunities for individuals whose employment prospects had been dimmed by past discriminatory practices. See Griggs, 401 U.S. at 429-30. Neutral, non-essential employment policies that discriminatorily impact protected groups would, if transposed onto such an uneven baseline, exacerbate the preexisting imbalance and countervail the core purpose of Title VII. Hence, the Court had ample reason to construe the language of Title VII to bar such practices, when not justified by an actual business necessity. See id. at 431.

By contrast, age-based discrimination correlates with contemporaneous employment-related conditions, not past discriminatory practices. See Hazen Paper, 507 U.S. at 610-12; Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). The aging process is inevitable, and Congress was not trying to dissolve those naturally occurring relationships through the medium of the ADEA, but, rather, aimed to protect older workers against the disparate treatment that resulted from stereotyping them as less productive and therefore less valuable members of the work force because of their advancing years. This divergence in purpose between Title VII and the ADEA counsels convincingly against mechanistic adherence to Griggs in the ADEA milieu.

The concurring opinion in Hazen Paper lends further support to this conclusion. In it, Justice Kennedy wrote for himself and two other Justices to underscore that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called disparate impact' theory of Title VII." Hazen Paper, 507 U.S. at 618 (Kennedy, J. concurring). "[T]here are," he wrote, "substantial arguments that it is im-

proper to carry over disparate impact analysis from Title VII to the ADEA." Id.

Other courts also find the arguments to which Justice Kennedy referred compelling. Since 1993, a majority of the courts of appeals that have addressed the question have held that the ADEA does not recognize causes of action premised on disparate impact. See Ellis, 73 F.3d at 1007; Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 138-39 (6th Cir. 1995); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994). The two courts of appeals that have held to the contrary have done so in reliance on pre-Hazen paper precedents and the law of the circuit doctrine. See District Council 37 v. New York City Dep't of Parks & Recreation, 113 F.3d 347, 351 (2d Cir. 1997) (relying on Maresco, 964 F.2d 106); Houghton v. SIPCO Inc., 38 F.3d 953, 958-59 (8th Cir. 1994) (assuming, without any discernible analysis or citation, the availability of disparate impact theory, presumably in light of Leftwich, 702 F.2d 686).[4]

Three additional considerations persuade us that the majority view is correct, that Hazen Paper foretells the future, that Griggs is inapposite in the ADEA context, and that proof of intentional discrimination is a prerequisite to liability under the ADEA. We touch briefly on each consideration.

1. Text and Structure. A critical asymmetry in the texts of the ADEA and Title VII counsels convincingly against recognizing a disparate impact cause of action under the former statute. The ADEA stipulates that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reason-

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[4] In Mangold v. California Pub. Util. Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995) (dictum), the Ninth Circuit expressed doubts as to the continued vitality of its pre-Hazen Paper ADEA disparate impact jurisprudence, but implied that its earlier decision still may be the law of the circuit.

able factors other than age." 29 U.S.C. § 623(f)(1). This proviso permits employers to utilize factors other than age as grounds for employment-related decisions that differentially impact members of the protected class (individuals between the ages of 40 and 69). When this exception is read with the ADEA's general prohibition against age-based discrimination, the resulting construction follows: it shall be unlawful to "discriminate against any individual . . . because of such individual's age," except when "based on . . . factors other than age." Thus, if the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that "only age discrimination is age discrimination." Such a circular construction would fly in the teeth of the well-settled canon that "[a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-52 (1st Cir. 1985).

The Supreme Court's treatment of similar language in the Equal Pay Act is instructive on this front. In County of Washington v. Gunther, 452 U.S. 161 (1981), the Court addressed 42 U.S.C. § 2000e-2(h), a statute that exempts wage differentials between men and women "authorized by the provisions of section 206(d) of Title 29" from Title VII's general prohibition against gender-based discrimination. Section 206(d), in turn, covers four types of situations, one of which parallels the exemption found in ADEA § 623(f)(1). Distilled, this provision allows payment of differential wages to men and women "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv) .

For analytic purposes, the Court juxtaposed this limitation on Equal Pay Act liability with Title VII's broadly inclusive prohibition against gender-based discrimination and commented that the limiting language worked to

"confine the application of the Act to wage differentials attributable to sex discrimination." Gunther, 452 U.S. at 170. For that reason, the Justices concluded that the Equal Pay Act "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex'." Id.; see also City of Los Angeles v. Manhart, 435 U.S. 702, 710 n.20, 713 n.24 (1978) (reasoning that the Equal Pay Act's "other factors other than sex" exception precludes liability based on disparities caused by independent factors). This statement suggests quite forcefully that the exception eliminates disparate impact from the armamentarium of weapons available to plaintiffs under the Equal Pay Act and, correspondingly, confines the scope of liability to instances of intentional discrimination, that is, to instances of disparate treatment.

We believe that the exception found in ADEA § 623(f)(1) effects a similar limitation on the type of claims that are permitted under the ADEA, and that any alternative conclusion would be untenable. When the ADEA's general prohibition and the statutory exception are read in pari materia, as a unified whole, the prohibition forbids disparate treatment based on age and the exception authorizes disparate impact. Thus, Professor Laycock's commentary, made in the Equal Pay Act context, applies equally to the ADEA: "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact. Douglas Laycock, Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues, 49 L. & Contemp. Prob. 53, 55 (1986).[5]

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[5] We hasten to add that, since Title VII contains no comparable exception, this difference in the statutory schemes further distinguishes Griggs.

2. Legislative History. The legislative history of the ADEA provides added support for interpreting it independent of Title VII in regard to disparate impact claims. When enacted, Title VII included a provision requiring the Secretary of Labor to conduct a detailed study on the causes and effects of age discrimination. See Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964). The resulting report, entitled The Older American Worker: Age Discrimination in Employment (1965) (the Report), served as a principal impetus for the ADEA. See Ellis, 73 F.3d at 1008. The Report remarked the need for legislation to combat stereotyping and to rectify the perception that older persons cannot do particular jobs. See Report at 6-11, 21-22. Conversely, it found "no evidence of prejudice based on dislike or intolerance of the older worker." Id. at 6. Inasmuch as disparate impact theory is designed to combat invidious prejudice that is entirely unrelated to an ability to perform the job, see Griggs, 401 U.S. at 429-32, the Report's findings suggest that the theory has no utility in age discrimination cases.

The Report also distinguished between "arbitrary discrimination" based on age (disparate treatment) and other institutional arrangements that have a disproportionate effect on older workers (disparate impact). Report at 21-25. It recommended that arbitrary discrimination be statutorily prohibited, but that systemic disadvantages incidentally afflicting older workers be addressed through educational programs and institutional restructuring. See id.; see also Ellis, 73 F.3d at 1008. The Report thus segregated the appropriate remedies for disparate treatment from those for disparate impact. A fair reading of the ADEA — the statute that followed hard on the heels of the Report indicates that Congress gave effect to this dichotomy by proscribing only intentional discrimination in age cases (while requiring the Secretary to study and develop education and research programs to lessen the negative employment effects that attend

the aging process). See 29 U.S.C. §§ 622-623; see also Ellis, 73 F.3d at 1008.

3. The 1991 Amendments. The third factor that persuades us not to emulate the Griggs approach to Title VII in the ADEA context concerns more recent legislative developments. In 1991, Congress amended Title VII to provide explicitly for causes of action based upon disparate impact. See Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991). It simultaneously amended the ADEA in myriad respects, see, e.g., id. at § 115, 105 stat. at 1079, but it did not create a corresponding disparate impact cause of action.

We are mindful that courts ordinarily should tread slowly in premising statutory construction on the action (or inaction) of subsequent Congresses. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988). Still, what transpires in a later legislative session sometimes constitutes a useful source of guidance in statutory interpretation cases, see, e.g., Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980); Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980); United States v. O'Neil, 11 F.3d 292, 300 (1st Cir. 1993); Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750, 755 n.7 (1st Cir. 1992), and we think that the circumstances at hand invite the application of that doctrine. Congress' insertion of an express provision for a disparate impact cause of action in Title VII renders the absence of such a provision in the ADEA — which was undergoing revision at the same time by the same committees and in the same bill — highly significant. See Richerson v. Jones, 551 F.2d 918, 927-28 (3d Cir. 1977) ; cf. General Elec. Co. v. Southern Constr. Co., 383 F.2d 135, 138 n.4 (5th Cir. 1967).

In sum, we have largely analogous statutes that diverge structurally on a discrete but important point. Coupled with the other factors we have discussed, this divergence helps to persuade us that Congress never intended to make a disparate impact cause of action available under the ADEA.

We fully agree with the Sixth Circuit's assessment: "The ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations." Allen v. Diebold, Inc., 33 F.3d 674, 677 (6th Cir. 1994).

To say more on this point would be supererogatory. For the foregoing reasons, we join those courts of appeals which have held that the ADEA does not impose liability under a theory of disparate impact. We therefore affirm the district court's entry of summary judgment for Raytheon on the appellant's federal disparate impact claim.

C. Disparate Impact — Chapter 151B.

We are left with the appellant's state-law disparate impact claim. The able district judge noted that Massachusetts has yet to determine whether disparate impact is actionable in age discrimination cases, but disposed of the claim on another ground. See Mullin, 2 F. Supp. 2d at 175. Consistent with our earlier approach, we address the threshold question.

The appellant disagrees that the viability of disparate impact theory in age discrimination cases remains unsettled under state law. He notes that Massachusetts outlaws many types of discrimination by means of a single, comprehensive statute (Chapter 151B) and that the Massachusetts Supreme Judicial Court (SJC) has recognized a disparate impact cause of action with respect to one group protected by that statute. See Cox v. New Engl. Tel. & Tel. Co., 414 Mass. 375, 385, 607 N.E.2d 1035, 1041 (1993) (discussing handicap discrimination). Building on this foundation, the appellant reasons that Chapter 151B makes a disparate impact theory available to all groups who fall within its protective carapace.

Although this construct possesses a certain superficial appeal, it cannot withstand scrutiny. Chapter 151B is divided

into several sections and subsections, and the structure of the statutory scheme itself suggests that separate provisions within Chapter 151B are to be interpreted independently. Age, for example, is treated separately within the Chapter 151B taxonomy. See Mass. Gen. Laws ch. 151B, § 4(1B).[6] This is especially significant because, when the legislature amended Chapter 151B in 1984, it moved age (which previously had been grouped alongside race, color, religion, national origin, sex and ancestry) from within the compass of section 4(1) and placed it in a separate, newly crafted statutory niche, section 4(1B).[7] See An Act Relative to the Dismissal of Certain Persons from Employment or the Refusal to Employ Such Persons Due to Age, 1984 Mass. Acts 631, 632-33. This structural redesign constitutes potent evidence that the legislature meant the two provisions to be distinct and interpreted independently of one another. Were this not so, there would have been no need to split section 4(1) in two.

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[6] So, too, is handicap discrimination. See Mass. Gen. Laws ch. 151B, § 4(16). This fact tends to limit the long reach that the appellant attaches to Cox.

[7] In pertinent part, the amended version of section 4(1) prohibits discrimination by a private-sector employer "in compensation or in terms, conditions or privileges of employment" on account "of the race, color, religious creed, national origin, sex, sexual orientation, . . . or ancestry of any individual," subject, however, to an exception for actions "based upon a bona fide occupational qualification." In contrast, section 4(1B) prohibits such employers from discriminating "in compensation or in terms, conditions or privileges of employment," on account "of the, age of any individual, "unless the employer's action is "based upon a bona fide occupational qualification."

The appellant's hypothesis that the Massachusetts courts have cleared disparate impact for use in all instances arising under Chapter 151B (including age discrimination) is flawed in another respect as well; it not only overlooks the structure of the statutory scheme, but also misreads the case law. As stated, the hypothesis rests upon three SJC decisions. one is Cox, to which we soon shall return. Neither of the other two is persuasive authority on the point.

School Comm. of Braintree v. MCAD, 377 Mass. 424, 386 N.E.2d 1251 (1979), was a disparate treatment case that involved gender discrimination. The SJC mentioned disparate treatment and disparate impact as available theories of liability. See id. at 429, 386 N.E.2d at 1254. There is no indication that the court intended this passing mention to encompass age discrimination. In point of fact, the court referred specifically to race, color, religion, sex, and national origin (all protected groups under section 4(1) but never mentioned age. See id. at 428, 386 N.E.2d at 1254.

The appellant's next case, Lynn Teachers Union v. MCAD, 406 Mass. 515, 549 N.E.2d 97 (1990), also concerned a disparate treatment sex discrimination claim. The SJC stated in dictum that "[a] prima facie case of employment discrimination can be based on a theory of disparate impact or disparate treatment." Id. at 526, 549 N.E.2d at 103. This dictum is unhelpful for present purposes. The court's focus was on the proper scope of section 4(17)(a), a provision of Chapter 151B that exempts "bona fide seniority systems" from the general proscription of Chapter 151B. Relying in part on the fact that section 4(17)(a) had been introduced into Chapter 151B by way of the 1984 amendments, see 1984 Mass. Acts 631-33, the court held that the legislature had not intended "to screen bona fide seniority systems from the scrutiny of all of the Commonwealth's antidiscrimination laws." Lynn Teachers, 406 Mass. at 525, 549 N.E.2d at 103. Rather, section 4(17)(a) was directed only to age discrimination claims. See id. Thus, Lynn Teachers

contradicts Mullin's hypothesis in two critical aspects: it exemplifies that all forms of discrimination proscribed by Chapter 151B ought not to be lumped together for interpretive purposes; and it illustrates the special way in which the SJC approaches age discrimination.

Against this backdrop, we find the approach taken by the SJC in Cox to be instructive. Cox dealt with Chapter 151B in the context of a handicap discrimination claim. Like age discrimination, handicap discrimination is governed by a separate provision within Chapter 151B. See supra note 6. Recognizing that Cox presented a question of first impression, the SJC stated that it would look for guidance to the federal courts, treatment of handicap discrimination under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. See Cox, 414 Mass. at 382, 607 N.E.2d at 1039. Declaring that there was "no reason to construe the Commonwealth's law differently" than its federal counterpart, the SJC then followed federal precedents holding disparate impact actionable under section 504. See id. at 390, 607 N.E.2d at 1043-44; see also Alexander v. Choate, 469 U.S. 287, 297 n.17 (1985) (collecting federal cases).

Cox epitomizes the SJC's general approach in such matters, see, e.g., White v. University of Mass. at Boston, 410 Mass. 553, 557, 574 N.E.2d 356, 358 (1991) ("The analysis of a discrimination claim is essentially the same under the State and Federal statutes."), and thus offers a window on the SJC's handling of Chapter 151B. It confirms our intuition that the SJC will interpret separate provisions of the statute independently. Moreover, Cox also shows that, when confronted with employment discrimination claims of novel impression, the SJC tends to rely on federal court interpretations of analogous federal statutes. Accord Vasys v. Metropolitan Dist. Comm'n, 387 Mass. 51, 54, 438 N.E.2d 836, 839 (1982) ("When the Legislature, in enacting a statute, adopts the language of a Federal statute, we will ordinarily construe the Massachusetts statute in accordance with the

construction given the cognate Federal statute by the Federal courts."); Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 611, 405 N.E.2d 106, 108 (1980) (similar).

We rule, therefore, that Cox, fairly read, does not justify an inference that the SJC, by recognizing disparate impact claims in terms of handicap discrimination, intended to transplant the theory into the age discrimination milieu. It follows that the SJC has not yet staked out a position in regard to the viability of age discrimination claims grounded in disparate impact. Because state law is inscrutable in this regard,[8] "it becomes our duty to vaticinate how the state's highest tribunal would resolve matters." Moores v. Greenberg, 834 F.2d 1105, 1107 (1st Cir. 1987). In that process, "we may seek inspiration from . . . analogous state court decisions." Kathios v. General Motors Corp., 862 F.2d 944, 949 (1st Cir. 1988).

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[8] We have researched the reported decisions of the Massachusetts Appeals Court and find them unhelpful on the question.

Here, we adopt the Cox court's approach. The Massachusetts age discrimination prohibition and the federal age discrimination prohibition are substantially identical, compare Mass. Gen. Laws, ch. 151B, § 4(lB), with 29 U.S.C. § 623(a)(1), and, as said, the public policy concerns implicated by age discrimination are distinct from the concerns created by other forms of discrimination. Under these circumstances, we conclude that, when faced with the question, the SJC likely will look to the federal courts' interpretation of the ADEA and hold that an age discrimination claim cannot be grounded solely on a theory of disparate impact. Accordingly, we sustain the district court's rejection of the appellant's remaining claim.[9]

III. CONCLUSION

We need go no further. Concluding, as we do, that the lower court appropriately granted summary judgment in Raytheon's favor on all four of Mullin's statements of claim, we affirm the judgment below.

Affirmed.

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[9] We may, perhaps, be conservative in our interpretation of state law, but the plaintiff, who chose to prosecute a state-law cause of action in a federal forum, had no right to anticipate that we would be more adventurous. See, e.g., Porter v. Nutter, 913 F.2d 37, 41 (1st Cir. 1990); Kassel v. Gannett Co., 875 F.2d 935, 950 (1st Cir. 1989).

United States Court of Appeals
For the First Circuit

No. 98-1656

WILLIAM MULLIN,

Plaintiff, Appellant,

v.

RAYTHEON COMPANY,

Defendant, Appellee.

ERRATA SHEET

The opinion of this Court issued on January 13, 1999 is corrected as follows:

On page 7, change footnote 2 to read:

This conclusion assumes, favorably to the appellant, that Blare remains good law. But cf. McMillan v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 312 (1st Cir. 1998) (opinion on order denying rehearing en banc).

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM MULLIN	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 96-12479-WGY
	)	
RAYTHEON COMPANY	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

YOUNG, D.J. April 20, 1998

William Mullin commenced this action pursuant to the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"), and the Massachusetts Anti-Discrimination Act, Mass. Gen. Laws ch. 151B, § 4(lB). Mullin is a New Hampshire resident and Raytheon is a Delaware corporation having its principal place of business in Massachusetts. The case is before the Court on Raytheon's Motion for Summary Judgment. Fed. R. Civ. P. 56.

Mullin advances two theories of recovery. He alleges disparate treatment -- that his age actually motivated the adverse employment action -- as well as disparate impact -- that a facially neutral policy affected employees over the age of forty more harshly than it did younger employees without any adequate business justification. The Court considers each

of Mullin's two theories, first under federal law and then under Massachusetts law.

FACTS

For the purpose of this motion the Court accepts as true Mullin's version of the facts, some of which are uncontested, and others of which Raytheon has chosen not to contest in the context of summary judgment. Mullin was born in 1934 and has been employed at Raytheon since 1967. Raytheon classifies its salaried employees according to a series of grades numbered 4 to 18, each of which carries a particular salary range. An employee may change levels without changing salary, or vice-versa, under certain circumstances, but generally may not receive a salary that is outside the range for his level. By 1995, Mullin was earning approximately $130,000 annually and had been classified at grade 15 since 1979. Raytheon consistently rated Mullin "outstanding" or "excellent" in performance reviews.

Mullin's job descriptions, as distinct from his salary or grade, varied considerably during his tenure. From November 1979 to November 1986, Mullin supervised over 2,000 employees as the Manufacturing Operations manager for Raytheon's Andover, Massachusetts plant. Between November 1986 and some time in 1991, however, he became the manufacturing operations Manager for the second shift at the Lowell, Massachusetts plant, where he supervised approximately 400 employees. After 1991, Mullin held a series of positions in various capacities at Raytheon, supervising smaller departments with fewer or no employees reporting to him. His latest assignment was in 1994, a transfer to the gyro and motorwind work centers in the Lowell plant, where he supervised between 55 and 85 employees. Mullin acted during these years as a "troubleshooter" who moved from position to position to intervene in areas that needed improvement or were experiencing problems.

In 1994 and 1995, in response to defense industry cutbacks, Raytheon closed its plants in Lowell and Manchester, New Hampshire, and moved those operations to its Andover facility. in conjunction with the plant closings, Raytheon underwent a major restructuring, resulting in a salary freeze and the consolidation of three defense divisions into one. The company eliminated redundant positions and either laid off or reassigned a number of employees. Mullin was neither reassigned nor laid off.

According to undisputed evidence offered by Raytheon, the company set out in the wake of restructuring to determine whether the salaries and grades of the remaining employees reflected their actual job descriptions and responsibilities. In Mullin's case, the company decided that his job responsibilities were not commensurate with a grade of 15. The company determined that Mullin should be classified as a manufacturing Program Manager, a grade 12 position, and that his salary should be reduced to the maximum for a grade 12 position. In October 1995, or thereabout, Raytheon reclassified Mullin from grade 15 to grade 12, and reduced his salary significantly.

The Raytheon employees responsible for the decision were Peter Gay, head of the newly-consolidated defense division, Joshua Merriman, the executive in charge of compensation and human resources, William Swanson, the general manager, Joseph DeBilio, the human resources manager, and Kevin Brewer, a staff manager and Mullin's immediate supervisor. Brewer recommended the reclassification to Merriman, DeBilio, and Gay as part of a general organizational review. Brewer based his recommendation on the number of employees Mullin supervised, the size of his department, his financial responsibilities for the company, and his place on the organizational chart. By company policy, the decision required the approval of both Brewer and Gay. The reclassification decisions were made in July 1995.

Mullin contends that the decision to downgrade him and reduce his salary rather than reassign him to a position commensurate with his grade level constitutes age discrimination. He identifies several incidents proximate to the reclassification and salary reduction that he says bear on his discrimination claim.

First, in March or April 1995, Ken Turner, a staff manager for Mullin's workcenter, on behalf of Peter Gay, asked whether Mullin intended to accept the voluntary retirement package that the company was then offering to certain qualified employees. When Mullin stated that he would not be taking early retirement, Turner informed him that Gay had instructed that Mullin's salary would be decreased by 10% within the year, with an additional reduction six months later. Gay raised the subject of early retirement again in November 1995.

Second, in October 1995 at a large meeting of managers and supervisors, Gay made reference to a particular senior hourly employee, stating "he is almost as old as Bill Mullin." The employee had been with the company since 1955.

Third, in January 1996, while Mullin was meeting with his immediate supervisor, Kevin Brewer, Turner came from behind and grabbed him by the throat very tightly, preventing Mullin from standing before releasing him. Another manager witnessing the scene said, "Who did you think it was, Peter Gay?" Turner disputes this version of events, and characterizes the contact as playful.

Fourth, again in January 1996, Raytheon employee Robert Rego slapped Mullin in the face twice, and another unidentified employee punched him in the arm in the plant cafeteria.

Fifth, on February 1, 1996, Turner misled Mullin regarding the format of a presentation he was to give the following week. As a result, Mullin's presentation before a large number of managers was inappropriate. In addition,

during the presentation, Mullin's view graphs were switched, and Brewer referred to the presentation as a "Jiffy Lube presentation." Mullin states that he had never experienced such hostility and abuse before the March 1995 meeting where he refused to take early retirement.

Finally, Mullin offers the expert opinion of David W. Griffin, Ph.D., a labor statistician who has drawn a statistical inference that older employees were more likely to be downgraded and less likely to be upgraded than younger employees in the Raytheon salary review.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Fed. R.Civ. P. 56(c). The burden is on the moving party to demonstrate the absence of evidence to support a necessary element of the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once such a demonstration is made, the burden falls on the nonmoving party to establish the existence of at least one issue that is both genuinely in dispute and that would materially affect the outcome of the case under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

II. Disparate Treatment

A. The ADEA Claim.

The federal Age Discrimination in Employment Act makes it unlawful for any employer "to discharge any indi-

vidual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age" or "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a). These provisions apply only to persons who are at least forty years old. 29 U.S.C. § 631(a).

1. Legal Standards

The federal framework for disparate treatment age discrimination claims, absent direct evidence of discrimination, follows the law of evidentiary relationships[1] as set out in McDonell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). See Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); LeBlanc v. Great American Ins. Co., 6 F.3d 836, 842-43 (1st Cir. 1993); Mesnick v. General Elec. Co., 950 F.2d 816, 823-24 (1st Cir. 1991). The plaintiff must open with proof of the "basic fact," i.e., make out his prima facie case. This done, a rebuttable presumption of illegal discrimination arises, which the defendant must rebut by articulating a legitimate nondiscriminatory reason for its actions. Thereupon, under federal law, the presumption dissipates. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510 (1993). These burdens are burdens of production; the plaintiff at all times bears the burden of persuasion. LeBlanc, 6 F.3d at 842.

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[1] The law of evidentiary relationships deals with the effect or relationship that proof of a specific fact or constellation of facts, which I call the "basic fact," has on another fact, which I call the "resultant fact." See Terry v. Electronic Data Systems Corp., 940 F. Supp. 378, 381 (D. Mass. 1996).

In cases where the presumption bubble bursts at the summary judgment stage, the judge considers all relevant evidence in a light most favorable to the plaintiff, including any evidence adduced to show that the employer's justification for its action was a mere pretext, to determine whether such evidence is sufficient to take the case to the jury. The plaintiff may not rely solely on the original inference of discrimination, however, to get to the jury. Hicks 509 U.S. at 511. Rather, the plaintiff must put forth evidence sufficient to enable a reasonable fact finder to conclude that the adverse employment decision was wrongfully based on age animus. LeBlanc, 6 F.3d at 843; Hidalgo v. Overseas Condado Ins. Agencies, Inc., 120 F.3d 328, 332 (1st Cir. 1997) (quoting Mesnick, 950 F.2d at 623). The plaintiff thus bears the ultimate "burden of proving that his years were the determinative factor in his discharge, that is, that he would not have [experienced adverse employment action] but for his age." Freeman v. Package Mach. Co., 865 F.2d 1331, 1335 (1st Cir. 1988) (citing cases).[2]

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[2] In the Second, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, if a genuine issue of material fact as to pretext exists at the summary judgment stage, the fact that an employer's legitimate, non-discriminatory reason for the adverse job action may be pretextual is sufficient to carry the case to the jury. Judith Olans Brown et al., Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Re-opening the Judicial Dialogue, 46 Emory L. J. 1488, 1523 (1997). In the First, Fourth, Fifth, and Eighth Circuits, however, the simple existence of this factual issue is not sufficient, of itself, to ward off summary judgment. See Id. at 1524. See also Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1994); Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1333 (8th Cir. 1996). These circuits are known as "pretext plus" circuits.

2. Mullin's Claim

For the purpose of this summary judgment motion, Raytheon does not contend that Mullin has failed to shoulder the minimal burden of establishing a prima facie case. As Mullin has therefore established the basic fact, here the presumption of illegal age discrimination arises.

Raytheon next goes forward and articulates a legitimate, non-discriminatory reason for its employment decision in accordance with the McDonnell Douglas framework. Raytheon states that it reduced Mullin's salary and grade classification because, at the time of the reclassification, his job responsibilities were no longer those of a grade 15 position. Because Raytheon policies mandated that his salary be adjusted to reflect his lower level classification, his salary was reduced to come within the range for grade 12 positions. See DiCola v. SwissRe Holding (North America), Inc., 996 F.2d 30, 33 (2d Cir. 1991) ("If a position's salary has been set at a level commensurate with certain job responsibilities and those responsibilities are subsequently diminished, an employer may make corresponding adjustments in positions and salaries regardless of the age of the employees involved."); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 117 (2d Cir. 1991) ("[t]here is nothing in the ADEA that prohibits an employer from making employment decisions that relate an employee's salary to contemporaneous market conditions and the responsibilities entailed in particular positions and concluding that a particular employee's salary is too high.").

Neither party disputes the existence of Raytheon's policy or that Mullin's position at the time of the reclassification did not fall within the criteria for grade 15 compensation. Indeed, Mullin does not dispute that Raytheon has offered a legitimate, nondiscriminatory reason for its actions. Raytheon has thus satisfied its burden of production, and

whatever presumption may have arisen out of Mullin's prima facie case has now vaporized.

3. Pretext

The contest is joined at the point of considering whether the non-discriminatory reason offered by Raytheon was the true reason for its actions or merely a pretext, and if so, whether the true reason was age animus.

The heart of Mullin's pretext argument rests on his evidence of abuse and harassment at work, and his superiors' repeated inquiries into his retirement plans. Shocking though some of this evidence may be, in particular Mullin's allegations of physical abuse, none of it would permit a reasonable jury to conclude that Raytheon's compensation policy was a sham, and that age animus motivated the company's personnel decisions.

Of the verbal and physical behavior that Mullin considers indirect evidence of age animus, the most outrageous treatment came at the hands of persons who were neither directly involved in the decision to reclassify him, nor influential in that process. According to Raytheon's uncontested account, neither Robert Rego, Ken Turner, nor the unidentified cafeteria assailant played any role in the personnel decisions relating to Mullin. These men, if Mullin's account is accurate, behaved deplorably in the context of a professional working relationship. Physical abuse and childish pranks, if they occurred, do no credit to Raytheon if it permits its employees to engage in such behavior.

This Court does not consider these allegations lightly. Nonetheless, the biases of those who neither made nor influenced the challenged decision are not probative of animus on the part of those who did, and cannot be relied upon to establish that Raytheon's policy was a mere subterfuge for age discrimination. See Smith, 40 F.3d at 18; Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 10 (1st Cir. 1990).

Moreover, there is no indication that these altercations had anything to do with Mullin's age.

In a similar vein, Turner's inquiries regarding Mullin's plans for the early retirement package cannot be relied on to show age animus. The offer of an early retirement package is a "carrot, not a stick," which, standing alone, does not support an inference of age discrimination. Schuler v. Polaroid Corp., 848 F.2d 276, 278 (1st Cir. 1988); see also Vega v. Kodak Carribean, Ltd., 3 F.3d 476, 480 (1st Cir. 1993); Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986).

The Court is left with a single episode involving an employee who played a central role in the challenged decision, viz. Peter Gay's remark that a senior hourly employee was "almost as old as Bill Mullin." Gay uttered this statement at a meeting on an topic unrelated to Mullin, the reorganization, or the salary review. "Isolated, ambiguous remarks are insufficient, by themselves, to prove discriminatory intent." Lehman v. Prudential Ins. Co. of America, 74 F.3d 323, 329-30 (1st Cir. 1996). At best, the remark indicates an awareness of Mullin's age and manifests the opinion that he was, in fact, old. What the statement does not reveal is the perception that Mullin was unable to do his job because of his age, or that his age made him an undesirable employee in any way. Cf. Young v. General Foods Corp., 840 F.2d 825, 829 (11th Cir. 1988) ("[A] statement merely comparing someone's age with that of another is insufficient to constitute direct evidence of discrimination."). Of equal importance, this remark does not tend to undercut Raytheon's proffered explanation that it was trying to rationalize its salary structure based on actual current job descriptions.

Mullin's statistical evidence is no more availing. While statistical evidence may be used to demonstrate pretext or discriminatory animus, Mesnick, 950 F.2d at 824, such evidence "rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale" for its actions toward an

individual employee. LeBlanc, 6 F.3d at 848; see Gadson v. Concord Hosp., 966 F.2d 32, 35 (1st Cir. 1992). At least in a disparate treatment case, the Court should inquire "less whether a pattern of discrimination existed and more how a particular individual was treated, and why." Cumpiano v. Banco Santander P.R., 902 F.2d 148, 156 (1st Cir. 1990).

In this case, the statistics Mullin offers purport to show that employees aged 50 and older were more likely to be demoted during the restructuring than younger workers. The same calculations, however, show that no such inference may be drawn for the protected class as a whole. When workers aged 40 and over are compared with younger workers, the disparity disappears. That is to say, there was no significant deviation between the percentage of protected employees involved in the salary review and those who were downgraded. moreover, considering only the pool of workers who were downgraded from level 15 positions,[3] and thus arguably similarly situated, there is no significant discrepancy even among employees aged 50 and over.

Raytheon's justification is that it has a policy of paying employees according to the level of work they currently perform, and not according to historic salary levels. When offered to rebut this justification, Mullin's statistics are simply insufficient for the task. The numbers do not address differences in these employees' experience, employment history, or value to the company, nor does the record as a whole indicate any connection between the statistics and Raytheon's policies and practices toward Mullin. See LeBlanc, 6 F.3d at 847-48. They simply are not probative of Mullin's argument that the policy itself is a subterfuge, be-

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[3] This pool consisted of Mullin and two other employees, one of whom was younger than fifty. The entire sample of downgraded employees from all levels is composed of twenty-one employees.

hind which Raytheon discriminates against its older workers. Even in combination with the various incidents Mullin describes, the statistics provide no logical support for the proposition that Raytheon's salary review and policies were motivated by his age, or that they were a pretext for reducing his salary.

Confronted with the acknowledged application of Raytheon's undisputed compensation policy to the facts of his situation, Mullin deftly switches the field. He contends that the explanation begs the question why he was assigned to below grade positions in the first place. Mullin contends that Raytheon is simply using one adverse employment decision the refusal to promote him to a position commensurate with his salary -- to justify another -- reclassification and reduction in salary.

He maintains that the pertinent questions for the Court are, "Why was Mullin demoted? Why wasn't Mullin considered for a level 15 position?' Pt's Opp'n at 7. Yet it is not the defendant's burden to answer these questions. Merely posing such questions is insufficient even to construct a prima facie case or prove the basic fact giving rise to the presumption. Mullin does not allege, nor does he offer any evidence that he was qualified for the level 15 position that he held, that he was qualified for any level 15 positions to which he was not promoted, that younger or less qualified people were hired or promoted ahead of him, or any other element of a prima facie case, other than his age. A failure to promote, standing alone, cannot give rise to an inference of employment discrimination. Cf. Udo v. Tomes, 54 F.3d 9, 14 (1st Cir. 1995) (failure to rehire); Ruiz v. Posadas de San Juan Assoc., 124 F.3d 243 (1st Cir. 1997) (same). Without more, such a failure may simply indicate that the employer does not wish to extend an offer of employment or promotion. A federal court is not a super-employment committee, Cf. Equal Employment Opportunity Comm'n. v. Amego, 110 F.3d 135, 145 (1st Cir. 1997), nor will this Court second

guess Raytheon's hiring or advancement decisions absent some evidence of irrationality or discriminatory animus. See Lehman, 74 F.3d at 329; LeBlanc, 6 F.3d at 846; Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990). Accordingly, the Court holds that Mullin has failed to raise triable issue as to pretext or age animus, both issues upon which he bears the ultimate burden of proof, and therefore a trial on these issues is not warranted.

B. The Chapter 151B Claim.

Massachusetts law prohibits an employer "because of the age on any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification." Mass. Gen. Laws ch. 151B § 4(1B).

The Massachusetts provision gives rise to the same presumption as in the federal analysis, but differs markedly in the effect given to a demonstration of pretext. Actions under Mass. Gen. Laws ch. 151B are governed by Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437 (1995). In Massachusetts, the plaintiff who makes out a prima facie case and then proves pretext conclusively establishes prohibited discrimination. Id. at 444-46. Nothing in Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122 (1997) changes this result. See McMillan v. Massachusetts Soc. for the Prevention of Cruelty to Animals, ___ F.3d ___, 1998 WL 110164 at *4 & n.4 (1st Cir. 1998).

If follows, therefore, that if a plaintiff makes even a showing of a genuine issue as to pretext, summary judgment cannot be granted on the state claim, even if the sum of the evidence is insufficient as matter of law to support a finding of discriminatory intent. On the federal claims, in contrast, summary judgment might nevertheless be appropriate, de-

spite a showing of pretext, because the finder of fact could credit the showing of pretext, and still be without a sufficient basis in evidence to find discrimination. See Terry, 940 F. Supp. at 381-85 (setting forth a detailed examination of the relationship between the state and federal burden shifting schemes in the context of summary judgment). If the plaintiff makes no showing of pretext, then the state and federal analyses collapse into one another and the summary judgment motion is decided according to familiar standards.

Accordingly, since Mullin has failed to raise a genuine issue as to the validity of Raytheon's proffered explanation, the distinctions in the state law analysis are not relevant to this case. On the Massachusetts law claims, as on the federal claims, Raytheon is entitled to judgement.

III. Disparate Impact

As an alternative, Mullin seeks to prove discrimination by demonstrating that Raytheon's policy, even if unintentionally, affected older employees more harshly than younger employees, and thus had a disparate impact that was inconsistent with the ADEA and Massachusetts civil rights law. As support, Mullin offers the statistical analysis to which this Court has already adverted.

A. The ADEA Claim.

The Supreme Court recognized the validity of the disparate impact theory of discrimination in Griggs v. Duke Power Co., 401 U.S. 424 (1971). There the court ruled, in the context of a Title VII action for racial discrimination in employment, that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.' Id. at 430. As a result, in appropriate cases, evidence that a facially neutral policy dis-

proportionately burdens a protected class of people is sufficient to establish a genuine issue of discrimination.

Congress has since codified disparate impact doctrine in Title VII. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75, codified at 42 U.S.C. § 2000e-2(k)(1)(A). Congress has made no such amendment to the ADEA,[4] and the Supreme Court has never squarely addressed the issue of whether disparate impact applies to age discrimination claims. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

Although the weight of authority prior to the 1993 Hazen decision supported the viability of disparate impact claims under the ADEA, the recent trend is to the contrary, and the weight of reasoned authority has now shifted.[5] But

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[4] Significantly, at the same time it amended Title VII, Congress also amended provisions of the ADEA. See Civil Rights Act of 1991, § 115, 105 Stat. at 1079 (concerning limitation of actions); id. at § 302(2), 105 Stat. at 1088 (extending ADEA coverage to Senate employees).

[5] Since Hazen, lower courts have expressed varying degrees of certainty on whether disparate impact applies to age discrimination claims. Compare Equal Employment Opportunity Comm'n v. Francis W. Parker School, 41 F.3d 1073, 1077 (7th Cir. 1994) ("[d]ecisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited."); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995) (noting in dicta that "in the wake of Hazen, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA"); Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139-40 & n.5 (6th Cir. 1995) (same); Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996) (holding that disparate impact claims are not cognizable under the ADEA); with

see Camacho v. Sears Roebuck de Puerto Rico, 939 F. Supp. 113 (D. P.R. 1996) (quoting the 1992 pre-Hazen decision in Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992), for the proposition that the weight of authority supports disparate impact under the ADEA).

Nevertheless, like the Supreme court, the First Circuit has never squarely addressed the issue. In Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986), the court stated "[a]n employee suing his employer for age discrimination must show either disparate treatment or a discriminatory impact." The court later explained, however, in Graffam v. Scott Paper Co., 60 F.3d 809, 1995 WL 414831, *3 (1st Cir. July 14, 1995) (unpublished table decision), that Holt had merely assumed the availability of the doctrine and had not discussed the matter or relied on disparate impact in deciding the case. Thus, as the Hazen opinion marks a divide in judicial thinking on this issue, it requires closer scrutiny.

In Hazen there was evidence that the defendant employer had fired the plaintiff in order to prevent his pension benefits from vesting. The court held that the decision to fire the plaintiff was not driven by a "prohibited stereotype" or "denigrating generalization about age", but rather represented an accurate judgment that the employee was "close to

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Mangold v. California Pub. Util. Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995) (noting both pre-Hazen and post-Hazen precedent approving of disparate impact, but affirming verdict under disparate treatment); Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996) (relying without discussion on existing precedent recognizing the viability of disparate impact claims under the ADEA); District Counsel 37, Amer. Fed. Of State, County and Muni. Employees v. New York City Dep't of Parks & Rec., 113 F.3d 347, 351 (2d Cir. 1997) (same).

vesting." Id. at 612.[6] The Supreme Court recognized the possibility that employers may use pension status as a proxy for age and thereby violate the ADEA, but the Court was careful to say that pension status would be viewed as a proxy for age "not in the sense that the ADEA makes the two factors equivalent, . . . but in the sense that the employer may suppose a correlation between the two factors and act accordingly." Id. at 613. The Court suggested that "[w]hen the employer's decision is wholly motivated by factors other than age," id. at 611, there could be no violation of the ADEA. This, in turn, implies that disparate impact, which does not rely on a showing of age-bias, is not available under the ADEA.

The Court did not decide the question of the viability of disparate impact claims under the ADEA, however, and three judges in concurrence expressly predicated their decisions to join in the opinion on the understanding that it did not resolve the issue. The concurring justices noted that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." Hazen, 907 U.S. at 618 (Kennedy, Thomas, and Rehnquist, JJ., concurring).

Despite the Supreme Court's suggestive language in Hazen and the gathering strength of authority against applying the disparate impact analysis to ADEA cases, this Court adopts the present stance of the First Circuit and assumes without deciding that disparate impact analysis might be appropriate under some circumstances in an ADEA claim. The Court does so largely because, even indulging this assumption, the record of this case reveals that Mullin's argument is nevertheless infirm. He has failed to raise a genuine dispute as to each of the necessary elements of a disparate impact case.

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[6] The firing was held to violate section 510 of ERISA, but not, without more, the ADEA.

1. Evidence of Disparate Impact

In order to establish a prima facie case, the "basic fact" of disparate impact, a plaintiff must (1) identify a facially neutral employment policy of the employer that (2) causes (3) a statistically discernable disparate impact on a protected employee group. See Equal Employment Opportunity Comm'n. v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 601 (1st Cir. 1995) (Title VII race discrimination). In the face of an established prima facie case, the employer bears the burden of producing evidence that the challenged policy was consistent with business necessity. Id. at 601-02, 607 ("Once the EEOC demonstrated a prima facie case of discrimination, the burden of production shifted.") (emphasis added).[7]

Mullin has satisfied the first two elements of his prima facie case claim. He specifically challenges the company-wide salary review and its attendant salary and grade level adjustments. In addition, there is no doubt but that the challenged policy caused the adverse employment action of which Mullin complains. What remains to be shown is that the policy resulted in a statistically measurable disparity between older and younger workers.

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[7] The allocation of burdens in Title VII disparate impact cases has fluctuated over time. Ward's Cove Packing Co. Inc. v. Atonio, 490 U.S. 642 (1989), held that the employer bears only a burden of producing evidence of a business necessity; the burden of persuasion remains with the employee-plaintiff. Id. at 659-60. Congress later amended Title VII to eliminate this final burden shift, and impose the burden of proof of business necessity on the employer. Civil Rights Act of 1991, § 105, 105 Stat. at 1074. Neither the Supreme Court nor Congress addressed burden shifting under the ADEA.

As an initial matter, the evidence does not demonstrate that the salary review resulted in a disparate impact on the protected class as a whole. Rather, as to those employees who were older than fifty, the evidence would support an inference of disparate impact. Specifically, the evidence shows that employees over fifty years old suffered salary reduction and downgrades in numbers that were disproportionate to their representation in the affected population.

It is not at all clear that this evidence suffices to establish a prima facie case of discriminatory impact. The second circuit, apparently the only circuit court to confront the issue, and one of only two circuits fully to embrace ADEA disparate impact claims after Hazen, has held that a disparate impact upon a segment of the protected group, where there is no impact on the group as a whole, cannot support a prima facie case. See Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir.), cert. denied, 118 U.S. 626 (1997); Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1372-74 (2d Cir. 1989). The Second Circuit has reasoned that a plaintiff who is allowed to select the subgroup for analysis potentially could show discrimination in situations that the statute was not meant to prohibit. See Lowe at 1373 ("[A]n 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'sub-group' of those age 85 and above, even though all those hired were in their late seventies."). At least one court in this circuit has rejected the Second Circuit's position, countering that the ADEA directs an inquiry into the fairness of the challenged policy toward individuals rather than toward groups, but the First Circuit has never expressed an opinion. See Graffam v. Scott Paper Co., 848 F. Supp. 1, 3-4 (D. Me. 1994), aff'd on other grounds, 60 F.3d 809 (1st Cir.

1995) (unpublished table decision) (affirming defense judgment and expressly declining to reach subgroup issue).[8]

2. Business Necessity

Like the disparate impact issue itself, the subgroup issue presents a conundrum that the Court need not resolve, because even if Mullin may rely on the statistics he offers, Raytheon has interposed a business necessity defense that Mullin has not rebutted. Raytheon has produced uncontested evidence that the company suffered a business contraction stemming from a downturn in the defense industry. Following plant consolidation and administrative restructuring, Raytheon's decision to reclassify many of its salaried employees was necessary to ensure that salaries and labor grades were commensurate with the actual job responsibilities of those employees. Mullin has offered nothing to suggest that such parity is not a necessary adjunct to a sound plan of business management, nor can he suggest any way that the company could have achieved its ends while imposing no disparate impact on its older workers. Mullin readily acknowledges that his position at the time of the salary reduction was not that of a grade 15 employee. That Mullin seeks to have his job responsibilities adjusted so that they

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[8] This Court has noted that the First Circuit allows a plaintiff to satisfy her prima facie burden by showing that she was replaced either by someone younger or by someone under forty, so long as the plaintiff's age places her within the protected category. See Devlin v. WSI Corp., 833 F. Supp. 69, 74-75 (D. Mass. 1993). That opportunity, however, has been confined to disparate treatment cases. The reasoning behind that rule is less compelling in a disparate impact case, where the proof derives its force from an analysis of the impact on the protected group as a whole.

correspond to his salary, rather than the reverse, is not surprising. But neither is it compelled by the ADEA.

3. The Chapter 151B Claim

As in the federal scheme, the application of disparate impact under chapter 151B age discrimination claims is far from settled. Although it is true that Massachusetts has embraced disparate impact in other contexts, following the federal model, see, e.g., Lynn Teachers Union v. Massachusetts Comm'n Against Discrimination, 406 Mass. 515, 526 (1990); School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination, 377 Mass. 424, 428-29 & n.10 (1979), no Massachusetts case has ever applied it in an age discrimination case. Because the Court has already concluded, however, that Mullin has failed to establish the existence of a genuine dispute as to Raytheon's defense of business necessity, even if the Court were to hold that Massachusetts has accepted disparate impact in age discrimination cases, Mullin can no more prevail under state law than he can under federal law.

CONCLUSION

Although Mullin has advanced his cause over several hurdles, his evidence is insufficient to create a genuine issue of material fact with respect to two critical issues: first to show that Raytheon's proffered rationale for reducing his salary was a pretext, and second to demonstrate that the reduction was not undertaken in accordance with business necessity. Even resolving all disputed matters and drawing all inferences in Mullin's favor, a reasonable jury could not hold Raytheon liable on either the federal or state claims.

Accordingly, Raytheon's motion for summary judgment as to all four counts of the complaint is hereby GRANTED.

/s/
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

APPENDIX C.

United States Court of Appeals
For the First Circuit

No. 98-1656

WILLIAM MULLIN,

Plaintiff, Appellant,

v.

RAYTHEON COMPANY,

Defendant, Appellee.

Before
Selya, Circuit Judge,
Coffin and Campbell, Senior Circuit Judges.

ORDER OF COURT
Entered: February 10, 1999

The petition for rehearing en banc filed by plaintiff-appellant William Mullin is, under this court's internal operating procedures, considered both by the panel and by the full court. Panel rehearing is hereby denied because, in the panel's view, rehearing would serve no useful purpose. For the most part, the appellant's arguments are adequately an-

swered in the panel opinion itself. In this order, we address only an argument that the appellant urges for the first time in his rehearing petition: the argument that 29 U.S.C. § 623(a)(2) (which makes it "unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age") controls here, and that, therefore, the panel's focus on 29 U.S.C. § 623(a)(1) skewed its analysis of the viability of disparate impact claims under the ADEA.

We note, first, that the appellant did not advance this contention below. He did not advance it in his appellate briefs. He did not advance it at oral argument. He did not request leave, after oral argument, to file a supplemental brief. The point is, therefore, foreclosed. "[A] party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the court of appeals." Anderson v. Beatrice Foods Co., 900 F.2d 388, 397 (1st Cir. 1990) (order denying rehearing); accord Kale v. Combined Ins. Co., 924 F.2d 1161, 1169 (1st Cir. 1991) (order denying rehearing).

We doubt, moreover, the applicability of section 623(a)(2) in this case. The appellant, after all, complained principally about the salary reduction, a claim that appears to implicate section 623(a)(1) (which makes it unlawful "to fail or refuse to hire or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age") (emphasis supplied), rather than section 623(a)(2).

In all events, had the appellant raised his new contention in a timely manner, the panel's textual and structural analysis would not have been altered by focusing on section 623(a)(2), along with section 623(a)(1). When reading the

section 623(a)(2) prohibition together with the section 623(f)(2) exception, the significance of the resulting construction remains unaffected: it shall be unlawful for an employer to "limit, segregate, or classify his employees . . . because of such individuals age," except when "based on reasonable factors other than age." This parallel construction is grammatically required because the punctuation associated with the "because of age" clause indicates quite clearly that Congress intended that clause to modify the language that sets forth the prohibited conduct. That is, the sentence prohibits "an employer from classifying an employee because of such individuals age in any way that would deprive him of employment opportunities or otherwise adversely affect his status as an employee." Pamela Krop, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837, 843 n.27 (1982); accord DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 733-34 (3d Cir. 1995).

The Tenth Circuit's rejection of ADEA disparate impact liability is instructive in this regard. In Ellis v. United Airlines, 73 F.3d 999, 1007 n.12 (10th Cir. 1996), the court noted that reading the two sections (§ 623(a)(1) and § 623(a)(2)) in pari materia requires the conclusion that both are limited to intentional discrimination — a conclusion that precludes disparate impact liability. We agree with this proposition and with the Tenth Circuit's holding. See id. at 1007.

The petition for panel rehearing is denied.

By the Court:
PHOEBE MORSE,
Clerk.

By: JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Holland, Cavanaugh, Kavanaugh and Ms Kirchwey]

APPENDIX D.

United States Court of Appeals
For the First Circuit

No. 98-1656,

WILLIAM MULLIN,
Plaintiff, Appellant,

v.

RAYTHEON COMPANY,
Defendant, Appellee.

ORDER OF THE EN BANC COURT
Before
TORRUELLA, Chief Judge,
COFFIN AND CAMPBELL, Senior Circuit Judges,
SELYA, STAHL, LYNCH AND LIPEZ, Circuit Judges.

Entered: February 10, 1999

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular, active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court En Banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
PHOEBE MORSE,
Clerk.

By: JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Holland, Cavanaugh, Kavanaugh and Ms Kirchwey]

APPENDIX E.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 98-1656

WILLIAM MULLIN,
Plaintiff, Appellant,

v.

RAYTHEON COMPANY,
Defendant, Appellee.

JUDGMENT
Entered: January 13, 1999

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court is affirmed.

By The Court
PHOEBE MORSE,
Clerk.
BY: JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Holland and Kavanaugh.]

APPENDIX F.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM MULLIN, Plaintiff,	)	
	)	CIVIL ACTION
v.	)	NO. 96-12479-WGY
RAYTHEON COMPANY, Defendant.	)	

JUDGMENT

YOUNG, D.J. April 21, 1998

Pursuant to the Memorandum and order dated April 20, 1998, judgment shall, and hereby does, enter for the Defendant.

/s/
Elizabeth Smith, Deputy Clerk

Approved as to Form: /s/
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

APPENDIX G.

RELEVANT PROVISIONS OF THE
RULES OF DECISION ACT,
28 U.S.C. § 1652

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

RELEVANT PROVISIONS OF THE
AGE DISCRIMINATION IN EMPLOYMENT
ACT OF 1967,
29 U.S.C. §§ 621-634

§ 623. Prohibition of age discrimination

(a) Employer practices.

It shall be unlawful for an employer --

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . .

*****

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency or labor organization --

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age ***.

*****

RELEVANT PROVISIONS OF THE
CIVIL RIGHTS ACT OF 1964,
42 U.S.C. §2000e *et seq.*

§ 2000e-2. Unlawful employment practices

(a)Employer practices.

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*****

RELEVANT PROVISIONS OF
MASSACHUSETTS GENERAL LAWS
CHAPTER 151B § 4

§ 4. Unlawful practices

It shall be an unlawful practice:

1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

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